

SINGAPORE REPORTS

E. PROFFITT v. W.T. PROFFITT

[C.A. (Chua, Kulasekaram and Tan Ah Tah JJ.)
February 4, 1975]

[Singapore — Civil Appeal No. 39 of 1974]

Family Law — Custody — Wife leaving matrimonial home in Japan and taking infant son with her — Wife writing to husband from Singapore asking for divorce — Husband discovering that wife was living with another man — Husband applying for custody of son — Wife resisting his application — Whether trial judge was right in refusing application of counsel for wife to cross-examine husband — R.S.C. 1970, O.38 r. 2(3) — Guardianship of Infants Act (Cap. 22), s. 3.

Practice and Procedure — Custody — Wife resisting husband's application for custody of son aged seven years old — Whether learned trial judge was right in not allowing counsel for wife to cross-examine husband — Appeal by wife — Guardianship of Infants Act (Cap. 22), s. 3 — R.S.C. 1970, O.38, r. 2(3).

The wife left her matrimonial home in Japan, and took her son, aged 7 years old, with her to Singapore. She wrote to her husband in Japan asking him for a divorce. Subsequently, the husband arrived in Singapore and discovered that his wife was living with another man. The husband applied for the custody, care and control of his son. The wife resisted the said application, and alleged that the husband never wanted the boy and never showed any interest or warmth towards the boy. Counsel for the wife sought to cross-examine the husband but his application was disallowed by the learned Chief Justice who proceeded to hear the husband's application and made an order that the custody, care and control of the son be given to the husband. The learned Chief Justice did not give his reasons for refusing the application of counsel for the wife to cross-examine the husband.

The wife appealed against the said order of the learned Chief Justice.

Held, allowing the appeal: the learned Chief Justice should have allowed counsel for the wife to cross-examine the husband as the wife in this case had made certain allegations against the husband.

COURT OF APPEAL.

D.G Ironside for the appellant.

Respondent not represented.

Chua J. (delivering the judgment of the Court): This case concerns a boy who is now 7 years of age. The parents were married on July 5, 1966, in the City of Naha, Okinawa, Japan and they lived in Okinawa. On or about August 25, 1974, the wife suddenly left the matrimonial home taking the boy with her. The wife came to Singapore on August 26, 1974, and telephoned the husband and said that she would stay here for a few days and would then return home but she did not give her address. The wife next telephoned the husband from Singapore on September 17, 1974, informing him that she wanted a divorce and again did not give her address. The husband arrived in Singapore on September 19, 1974, and after inquiries found her living with one Robert Hines, a married man separated from his wife. The boy was then with the wife and the wife refused to allow the husband to take the boy back to Okinawa so that the husband could put him in a school where he was registered to start school on August 26, 1974. Consequent upon the wife's refusal the husband applied to the court, by way of Originating Summons, for the custody, care and control of the boy.

A The matter came before the learned Chief Justice in chambers on October 25, 1974. The application of the husband was resisted and allegations were made by the wife that the husband never wanted the boy and that the father never showed any interest or warmth towards the boy. Application was made by counsel for the wife to file an affidavit setting out in detail grounds why she left the husband and for the attendance of the husband, who was then in Singapore, for cross-examination on his affidavit. The learned Chief Justice refused counsel's application to cross-examine the husband and proceeded to hear the summons, and made an order that the custody, care and control of the boy during his minority or until further order be committed to the husband and that the wife forthwith deliver the boy to the husband.

C The wife now appeals against the order of the learned Chief Justice. The husband has returned to Okinawa with the boy. Counsel for the husband is no longer acting for the husband. At the hearing of the appeal the husband was not represented.

D Several grounds of appeal were taken by counsel for the wife. It is necessary for us to deal with only one ground namely that the learned Chief Justice was wrong in refusing to permit the cross-examination of the husband.

E The learned Chief Justice did not give his reasons for refusing the application of counsel for the wife to cross-examine the husband.

Order 38 Rule 2(3) of the Rules of the Supreme Court provides:—

F "In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the court otherwise directs, but the court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the court."

G In an application for this nature the court must regard the welfare of the infant as the first and paramount consideration. Section 3 of the Guardianship of Infants Act (Cap. 22) provides:—

H "Where in any proceedings before any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother be deemed to have any claim superior to that of the father."

I The principles on which the court acts are set out in Volume 21 of *Halsbury's Laws of England* at page 194 paragraph 429 as follows:—

"The court, in making orders as to custody or access, will have regard to the conduct of the parents and to the wishes as well of the mother as of the father. It will exercise its jurisdiction to interfere in the interests of a child on account of the father's conduct, if it is satisfied that he has so conducted himself, or has shown himself to be a person of such a description or is placed in such a position as to render it practically essential to the safety or welfare of the child that

the father's right should be treated as lost or suspended and should be superseded or interfered with. Interference will be justified by actual cruelty of the father either to his wife or child, by his avowal and adoption of principles of an irreligious and immoral character, by marital misconduct or by lack of means. Other things being equal, it is preferable that a child of tender years should be with its mother."

As the wife in this case has made certain allegations against the husband, we are of the view that in the circumstances of this case the learned Chief Justice should have allowed counsel for the wife to cross-examine the husband.

The wife is not seeking a re-hearing of the matter but intends to apply for custody of the boy in some other court.

This appeal is allowed and the order of the learned Chief Justice is set aside. There will be no order as to costs.

Appeal allowed.

Solicitors: Ironside & de Souza.

**RE VALIBHOY CHARITABLE TRUST;
MOHAMED SHARIFF VALIBHOY v. BRITISH
& MALAYAN TRUSTEES LIMITED & ORS.**

[C.A. (Wee Chong Jin C.J., Chua and Kulasekaram JJ.)
February 19, 1976]

[Singapore — Civil Appeal No. 10 of 1975]

Trust — Charitable trust — Clause providing for the setting up of school/schools for religious instruction or for the education of persons in the English language — Inability of trustees to implement provision — Whether trust ought to be applied cy-pres — Whether a general charitable intention for the advancement of education could be inferred.

By a Will dated April 1948, a testator gave his trustees upon trust certain sums of money for, *inter alia*, "... the purpose of buying land and buildings for and/or for building, maintaining, improving and establishing one or more schools at my trustees absolute discretion for religious instruction (known as Madrasahs) and one or more schools at my trustees discretion for the education of persons in the English language and general matters...". In 1971, the trustees, in accordance with the said trust provision, applied to the Ministry of Education, India, to set up school/schools but their application was not granted. In 1974, an Originating Summons was taken out by the trustees for the determination of whether certain provisions of the Will had failed in the events which had happened and on the true construction of the testator's Will, and if so, whether the doctrine of cy-pres ought to apply. The High Court ([1975] 1 M.L.J. 187) held that the trusts had not failed but should be carried into effect cy-pres by a scheme which conforms to the testator's directions as closely as possible.

The appellant appealed against the judgment and contended that as the main object of the testator's gift was the establishment of a particular type of school in a particular locality of his choice, a general charitable intention for the advancement of education could not be inferred. He further submitted that the learned Judge erred in law in directing that a scheme should be prepared and submitted for his approval as such direction is contrary to the general rule that the court will not direct a cy-pres scheme in respect of a charitable trust which is expressly intended to be performed in India which is outside its jurisdiction.

Held, dismissing the appeal: (1) if there are insuperable objections, either of fact or of law, to a literal execution of a charitable trust it at once becomes a question whether the desires or directions of the author of the trust, with which it is found impracticable to comply, are essential to his purpose. If a wider purpose forms his substantial object

A and the directions or desires which cannot be fulfilled are but a means chosen by him for the attainment of that object, the court will execute the trust by decreeing some other application of the trust property to the furtherance of the substantial purpose, some application which departs from the original plan in particulars held not essential and, otherwise, keeps as near thereto as may be;

(2) according to the true construction of the Will, it discloses a general intention of charity;

B (3) the court may direct a scheme to be settled where trusts, which have been established within the jurisdiction for the endowment of a charitable object out of the jurisdiction become impracticable but the fund and the trustees are within the jurisdiction.

Cases referred to:-

(1) *Re Wilson, Twentyman v. Simpson* [1913] 1 Ch. 314 at pages 320 and 321.

C (2) *Attorney-General (N.S.W.) v. Perpetual Trustees Co. (Ltd.)* (1940) 63 C.L.R. 209.

COURT OF APPEAL.

H.E. Cashin for the appellant.

H.M. Dyne for the trustees.

D *Warren Khoo* (Dy. Senior State Counsel) for the Attorney-General.

Wee Chong Jin C.J. (delivering the judgment of the Court): By his Will made in April 1948 Haji Vali Mohamed bin Jooma otherwise known as Valibhoy Jumabhoy otherwise known as A.A. Valibhoy (hereinafter referred to as "the Testator") who died on April 8, 1950 devised and bequeathed to his Trustees all his property upon, *inter alia*, the following Trust (hereinafter referred to as "the Valibhoy Charitable Trust"):-

"4. My trustees shall set aside one third share of my net estate upon trust to pay thereout to the said ABDUL GANI BIN JINAH a sum of Rs. 25,000 and to AMED BIN JINAH a sum of Rs. 25,000 and upon Trust to HOLD the balance of such one third share of my net estate for charitable purposes (which said balance is hereinafter called "the Valibhoy Charitable Trust") and shall subject to the provisions of para 6 hereof hold the same upon the trusts following, namely:-

F (i) To employ 30% of the capital of the Valibhoy Charitable Trust and any net income from time to time arising from such 30% for the purpose of buying land and buildings for and/or for building, maintaining, improving and establishing one or more schools at my trustees absolute discretion for religious instruction (known as Madrasahs) and one or more schools at my trustees absolute discretion for the education of persons in the English language and general matters. In connection with such schools I give to my trustees the following directions, namely:-

G (a) Such schools shall, subject to the provisions hereinafter contained, be established in Jetpur and the state of Khatiawar, or at places in its neighbourhood, and
H (b) Persons who profess the Mohamedan religion and are of the Gatchee class shall be given preference at all times in attending such schools as scholars.

(ii) To invest 50% of the capital of the Valibhoy Charitable Trust in the investments hereinafter authorised and to use the net income arising therefrom for the general upkeep and maintenance of all or any of such schools and for the provision of scholarships to such schools and to pay for the salaries accommodation and food of teachers, managers and other staff of the said schools and generally for the benefit of the said schools in such manner as my trustees shall in their absolute discretion think fit.

I (iii) To invest 10% of the capital of the Valibhoy Charitable Trust in the investments hereinafter authorised and to use the net income arising therefrom in the repair and improvement of the said schools notwithstanding that there may be other moneys available for the said purpose.